No. 87-1161

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF ILLINOIS,

Petitioner

vs.

MICHAEL KIRKPATRICK,

Respondent.

On Petition For A Writ of Certiorari
To The Appellate Court of Illinois,
First Judicial District.

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Appellate Court correctly affirmed the trial court's suppression order, where the record is devoid of evidence that defendant's seized clothing was in plain view of either the officer making the seizure or any other officer, and where the reviewing court properly found that "overwhelming evidence" indicated the police had no right to be in defendant's hospital room, from which his clothing was seized.

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BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

OPINION BELOW

The state reviewing court disposed of petitioner's appeal in an unpublished order pursuant to Illinois Supreme Court Rule 23. Ill. Rev. Stat., 1985, Ch. 110A, Sec. 23. Rule 23 states, in applicable part, that orders, as opposed to published opinions, are not precedential. The State court's Rule 23 Order is photographically reproduced in Appendix A to this brief for respondent.

JURISDICTION

The jurisdictional requisites are adequately stated in the petition. Respondent notes, however, that the Appellate Court decision relied on both State and Federal law. (Petition for Writ of Cert., Appendix, p.12) Although this fact does not deprive this Court of jurisdiction, it suggest an independent basis for affirmance. In addition, as set forth in the argument that follows, respondent does not believes petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the petition so that the state court order may be reviewed.

STATEMENT OF THE CASE

On December 21, 1983 defendant Michael Kirkpatrick walked into the Cicero, Illinois police station. According to Captain Manak, defendant reported having been at Dorice Trytek's Berwyn apartment early that morning. (R.178) He came out of the bathroom and saw Dorice speaking to two white men. As he turned off the bathroom light, he was hit over the head by a white woman. (R.179) Defendant told police he recalled nothing further until he awoke 10-12 hours later in his car, parked at Hines Lumber Company in Cicero. (R.179,183)

Defendant apparently drove immediately to the Cicero police station, where he arrived at 1:30 p.m. (R.178) Cicero police drove him to tne Berwyn Police Department (R.5), where he collapsed. (R.18) He was rushed by ambulance to MacNeal Hospital and admitted for head injuries. (R.6,16) During defendant's entire 3-4 day hospitalization, which followed, an armed uniformed police guard was stationed outside his door. (R.6,97,116) Defendant was snackled to the bed until doctors ordered him freed (R.121), and he was shackled to a gurney each time he was taken from his hospital room for tests. (R.8) The telephone was removed from his room on orders of Officer Garrity (R.118), and defendant was permitted no calls or visits whatsoever, not even from his wife. (R.7-8,102,118) Two of the guards testified they received instructions to guard a "murder suspect". (R.110-111,118)

At 3:45 p.m. on December 21, 1983, Berwyn police detective Ken Zolecke went to MacNeal Hospital to speak with defendant. (R.22) Although defendant was in "pretty bad shape" (R.33), he spoke to the detective in his hospital room and reported that he had been attacked by three people at Dorice's apartment and knocked out, and that he woke up at the Hines Lumber Company in Cicero. The officer testified he learned at the hospital that defendant had suffered a head injury. At that point, the office terminated his conversation

with defendant, and without defendant's consent took his clothes as evidence. (R.8,26,33) According to the detective's testimony, defendant was a crime victim, and it is normal police procedure to take a victim's clothing to test it for "trace material." (R.26,27)

After hearing, written memoranda of law and extensive argument, the trial judge suppressed the clothing. (R.138) The court rejected police testimony tnat the clothing had been taken because defendant was a crime victim and was, at the time, the only link to a homicide under investigation. (R.132,138) The court found, on the contrary, that defendant was considered a suspect when he entered the police station, found he was unlawfully detained without probable cause, and found the seizure non-consentual and violative of tne Fourtn and Fourteenth amendments. (R.138) State appeal followed.

REASONS FOR DENYING THE WRIT

THE STATE COURTS CORRECTLY APPLIED THE LAW TO THE FACTS OF THIS CASE, WHERE THE RECORD CONTAINS NO EVIDENCE THAT RESPONDENT'S SEIZED CLOTHING WAS EVER IN PLAIN VIEW, AND WHERE IT WAS SEIZED FROM RESPONDENT'S HOSPITAL ROOM, WHERE THE POLICE HAD NO RIGHT TO BE.

Petitioner's argument rests decisively on the plain view doctrine. There is no evidence, however, that defendant's seized clothing was ever in plain view of any police officer.

Defendant's socks, vest, sweater, shirt, boots, belt and jeans were seized from his hospital room. (R.9) Although the seizure occured during a Chicago winter (December 21, 1983) there is no evidence any outer garments were seized. In Illinois, seizure of evidence is proper under the plain view doctrine when the following conditions are satisfied:

1) the object seized is actually in plain view;

2) the officer views the object from a position where he has a right to be; and

3) facts and circumstances known to the officer at the time he acts give rise to a reasonable belief that the items seized constitute evidence of criminal activity.

People v. Testa (1984), 125 Ill. App. 3d 1039, 1043, 466 N.E. 2d 1126, 1130; People v. Montgomery (1980), 84 Ill. App. 3d 695, 698, 405 N.E. 2d 1275; People v. Holt (1974), 18 Ill. App. 3d 10, 12, 309 N.E. 2d 376. In affirming the trial court's suppression order, the appellate court found "overwhelming evidence" that defenant had been forcibly confined to his hospital room without probable cause. Thus, the police had no right to be in his hospital room when they seized his clothing. (Opinion, p.6-7)

Since the second requrement of the plain view doctrine was not met, the reviewing court did not have to decide whether the other two requirements had been met. In fact, they had not. The seized items must actually be in open view. In other words, they must be "inadvertently come upon," and "it must be immediately apparent to the police that they have evidence before them." Coolidge v. New Hampshire (1971), 403 U.S. 443, 466-468, 29 L.Ed. 2d 584; People v. Tate (1967), 38 Ill. 2d 184, 230 N.E. 2d 697.

There is no evidence in the record that defendant's clothing was in plain view when it was seized or that it was immediately apparent to the police that it constituted evidence of a crime. Defendant walked into the Cicero police station at 1:30 p.m., collapsed at the Berwyn police station, and was rushed by ambulance to MacNeal Hospital. None of the officers who observed defendant during this period seized defendant's clothing, and none testified at the suppression hearing. Detective Zolecke arrived at the hospital more than two hours after defendant had walked into the police station. (R.22) He was not asked at the suppression hearing whether defenant was wearing the seized items, and he was not asked whether the clothing was otherwise visible to him during his conversation with defendant. Since there was no evidence the clothing was ever observed prior to its seizure, there was no evidence it was immediately apparent to the police that they had evidence before them." Coolidge, supra, p.466.

Having failed to satisfy both federal and state requirements of the plain view doctrine at the time of the seizure, the State now argues that defendant's clothing must have been within plain view of non-testifying police officers more than two hours earlier, when defendant walked into the police station. (Pet. for Cert., p.18-19) Leaving aside the dubious legal merit of this argument, it is not factually supported by the record. No officer testified to having seen "blood-stained" clothing at any time. On the contrary, Det. Zoelke, who made the seizure, claimed defendant was a crime victim, and it was normal police procedure to take a victim's clothing for "collecting trace material." (R.26,27) The trial court rejected the detective's testimony and found, first, that defendant was treated as a suspect, not as victim as the detective claimed and, second, that there was no customary procedure to seize clothing, as the detective claimed. The State, having failed to present any evidence that defendant ever voluntarily displayed visibly blood stained clothing to the public, cannot now assume that unidentified police officers at some unidentified prior time probably saw the clothing, thereby justifying any subsequent seizure under the plain view doctrine. The fact that the clothing was seized not because it was visibly blood-stained, but to test for "trace material" further demonstrates the factual insufficiency of this argument.

Petitioner's argument rests on facts rejected by both the trial and appellate court and on a novel legal theory which, even if valid, would not find factual support in this record. This Court traditionally has not granted certiorari to State reviewing courts to review the factual correctness of state court decisions. Watts v. Indiana (1949), 338 U.S. 49, 50 n.1, 93 L.Ed. 1801. Resolution of factual matters should be left to the states and certiorari denied.

CONCLUSION

For the reasons stated herein, respondent Michael Kirkpatrick respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Third Div. Filed 3-18-87

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposit of the same.

85-3389

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellant, vs. MICHAEL KIRKPATRICK, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. Honorable James A. Zafiratos, Judge Presiding.

McNAMARA, P.J.,

O R D E R

On March 13, 1984, the defendant Michael Kirkpatrick was indicted for the murder of Dorice Trytek. Defendant moved to suppress evidence which the State had obtained after ostensibly detaining and questioning him as a victim of a crime. This evidence included the defendant's clothes as well as blood, hair, and saliva samples. Following an evidentiary hearing on the motion, the court suppressed all four of the items because they were seized pursuant to an illegal detention and without consent in violation of the defendant's Fourth Amendment rights The State now brings this appeal, contending that: (1) the trial court erred in finding that the defendant was detained without probable cause and that his clothing was illegally seized during that detention; (2) t trial court erred in finding that the defendant did not effectively consent to giving blood, hair, and saliva samples; and (3) the blood, hair, and saliva samples were not the direct product of an illegal

detention.

At the suppression hearing, defendant testified that on December 1983, he went to the Cicero police station after he awoke to find hims in a car in the Hines Lumber Yard in Cicero. Defendant said that he h previously spent the night at the apartment of Dorice Trytek, the murd victim, and that at her apartment he had been knocked unconscious by a unknown woman.

Kirkpatrick testified that he was then driven to the Berwyn polic department where he collapsed and thereafter was taken by ambulance to MacNeal Hospital where he remained for three to four days during treat ment for a concussion. During this time a uniformed police guard was always stationed outside his door, and defendant was shackled to the b until the doctors ordered him freed. He was also shackled to a gurney each time he was taken from his hospital room for tests.

Defendant also testified that he was not allowed access to a tele- phone during this time, nor was he allowed to see his wife. He also stated that he did not consent to have his clothes taken from him, and that he was never informed that he was a suspect in a homicide case.

Defendant then said that after he was released from the hospital, police officer called him 10 to 15 times at home, asking him to come b to the hospital and give a blood sample. At this time he was taking a drug called Elavil for his head injury and this medication made him drowsy. The defendant stated that on January 13, 1984, he was escorted back to MacNeal Hospital by two police officers where he voluntarily signed the consent form for the withdrawal of blood. He later signed a second form, ostensibly a Berwyn police form, at this time but no one ever told him of his right to refuse. Defendant also said that

although the police did not inform him of this right to refuse, they to his hair and saliva samples.

Investigator Ken Zolecke of the Berwyn police then testified that while the defendant was at the hospital, he had taken the defendant's clothes, and given them to the evidence technicians. Zolecke said that it was normal procedure to take a crime victim's clothes in order to lo for trace materials associated with the crime. Zolecke also testified that when the defendant was in the hospital, the police regarded him as victim of a crime, and not as a murder suspect. On cross-examination, Zolecke said he could not recall whether other police officers had been stationed outside defendant's room, but he did concede that at the time he took the defendant's clothes he had no search or arrest warrant. He also stated on cross-examination that the defendant never gave oral or written consent to take his clothes.

Investigator Roger Montoro of the Berwyn police testified that he had been the officer who called on one occasion to defendant's house to request saliva, blood, and hair samples. He said that when he talked to defendant on the telephone, defendant had said that he would "help out in any way that he could." Montoro also testified that he and his partner, Officer Ed Dedek, took defendant to MacNeal Hospital for a blood test, where defendant then signed a waiver consent form for a blood specimen. Montoro said that the defendant had orally consented to taking of hair samples. On cross-examination, Montoro conceded there had been no written consent form for hair and saliva samples, but that he had told defendant that he did not have to submit to a blood test. He also claimed that he told defendant that he had a right to refuse the saliva and hair sample tests.

Detective Dedek of the Berwyn police then testified that he and Montoro accompanied the defendant to MacNeal Hospital for taking of samples. He said that he had told defendant that he did not have to consent to the taking of blood, but that the defendant had agreed to do so and also agreed to give hair and saliva samples; the defendant had even removed hair from his head himself. Dedek denied that defendant h been considered a murder suspect when these samples were taken. He als denied that he ever called defendant at home.

The record discloses that defendant's attorney sought to subpoena other Berwyn police officers, as well as Berwyn police records. The court granted this request. Subsequently auxiliary police chief John Izzo testified that on December 21, 1983, he received a call from the deputy superintendent who said that he needed some officers to go to MacNeal Hospital. Watch commander of the Berwyn police department, Anthony Adolf, testified that he had told Officer Ilich to go to MacNea Hospital for the purpose of watching the defendant. Adolf also testifi that the defendant had been shackled by his foot, and that defendant ha not been allowed any telephone calls or visitors. After viewing a poli report to refresh his memory, Adolf stated that he had referred to the defendant as a suspect.

Berwyn police officer Antoine Ilich testified that on December 21, 1983, he received an assignment to guard defendant, who was described a a murder suspect by Adolf. Ilich also stated that Adolf had told him that there were to be no telephone calls, and no one was to have access to the defendant's hospital room. Ilich also said that he was in unifo and wearing his sidearm during his assignment.

Raul Hernandez of the Berwyn police department testified that he

also received an assignment to guard a murder suspect named Michael Kirkpatrick at MacNeal Hospital, and to make sure that there were no telephone calls or visitors for defendant. Hernandez then looked at a report which he had previously signed in order to refresh his memory, which stated that he had functioned as hospital security for a murder suspect. While Hernandez was at the hospital a nurse had said that a doctor had removed the handcuffs from defendant.

Based on the evidence, the court concluded that defendant had been in police custody at the hospital and that the taking of his clothes constituted an illegal seizure. The court also found that the blood, saliva, and hair specimens taken on January 13, 1984, were nonconsensua and constitutionally impermissible. The State now appeals this ruling.

The State first contends that the trial court erred in finding tha defendant's clothes were illegally seized. We agree with the trial cou that the taking of defendant's clothes without a warrant constituted a seizure within the meaning of the Fourteenth Amendment. Defendant had a legitimate privacy interest in his clothes because: (1) he had a subjective expectation of privacy in the clothes he wore to the hospital and (2) absent a custom to the contrary, a person would not automaticall expect his clothes to be subject to police confiscation in a private hospital room. (See Katz v. United States (1967), 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (Harlan, J., concurring).) The State's reliance on People v. Sutherland (1980), 92 Ill. App. 3d 338, 415 N.E.2d 1267, is misplaced because in that case, the credible testimony indicate that the customary practice in a hospital was to inventory the clothing of crime victims. In the present case, the trial court apparently concluded that there was no such customary procedure. Credibility of

testimony is for the trial court to determine, and it will not be disturbed upon review unless it is manifestly erroneous. People v. El (1978), 74 Ill. 2d 489, 384 N.E.2d 331.

The State's reliance on People v. Torres (1986), 144 Ill. App. 3d 187, 494 N.E.2d 752, is also inappropriate because in that case clothes were not the items seized -- cannabis was. Furthermore, in that case there was no legitimate expectation of privacy in a hospital emergency room, because such a room constitutes a "port of entry" to the more private rooms in the hospital.

The State maintains that even if such a taking constituted a seizu within the meaning of the Fourteenth Amendment, the clothes are admissi ble under the plain view exception to the warrant requirement. Under this exception a police officer may, without a warrant, seize contraban or other evidence which is in plain view. (Texas v. Brown (1983), 460 U.S. 730, 75 L. Ed. 2d 502, 103 S. Ct. 1535.) In Illinois, the seizure of evidence is proper under the plain view doctrine when the following conditions are satisfied: (1) the object seized is in plain view; (2) tl officer views the object from a position where he has a right to be; an (3) the facts and circumstances known to the officer at the time he act gives rise to reasonable belief that the items seized constitute eviden of criminal activity. People v. Testa (1984), 125 Ill. App. 3d 1039, 4 N.E.2d 1126.

The overwhelming evidence in the record indicates that the police used force to confine defendant to his hospital room, and there has nev been a claim that the police had probable cause to effect this confine- ment. Defendant had also testified that he had not consented to the taking of his clothes. Since the detention of defendant as a murder

suspect was illegal, the police had no right to be in the defendant's hospital room when they seized his clothes, so it is immaterial whethe the police seized the clothes as evidence of a criminal instrumentalit

Accordingly, we hold that the trial court did not err in suppress defendant's clothing because the police obtained it in a place where t had no right to be.

The State also contends that the trial court erred in finding tha defendant had not validly consented to the taking of blood, saliva, anc hair samples when he returned to MacNeal Hospital. We note that in the context of the Fourth Amendment, a suspect has a privacy interest in hi own person. (See Schmerber v. California, (1966), 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed.2d 908.) As a result, the warrantless seizure of physical evidence from a person, absent exigent circumstances or the evanescence of evidence, will be suppressed unless the defendant consen to the taking. (Schmerber v. California; see also Cupp v. Murphy (1973 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900.) The State must prove consent by clear and positive testimony and must also establish that there was no duress or coercion, actual or implied. (Schneckloth v. Bustamonte (1973), 412 U.S. 218, 36 L. Ed. 854, 93 S. Ct. 2041.) Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. (Johnson v. Zerbst (1938), 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019.) Voluntariness is a question of fact to be determined from all the circumstances, and although the State need not show that a consenting party was advised of his rights secured by the Fourth Amendment, the failure to do so is a factor which bears on the understanding nature of the consent. Schneckloth v. Bustamonte.

In this instance, the trial court apparently believed the defendant's testimony because it found that he never effectively consented t the taking of blood samples for laboratory analysis. The trial court also found that the taking of saliva and hair samples should have been done with a court order. The record discloses that defendant claimed t be taking medication which made him drowsy at the time he signed the consent form for the blood sample. Also, according to defendant's testimony, the police repeatedly called him at his home and then accomp nied him to the hospital after an original four-day hospital stay,in which he had been effectively isolated by armed guards and shackled for time to his bed. It is also significant that according to defendant th police never told him of his right to refuse the giving of such samples

All the above circumstances would allow a conclusion that defendan was at least impliedly coerced into cooperating with the police, and th his consent was not freely and voluntarily given. Although there is considerable conflicting testimony in the record, especially with respe to oral consent for saliva and hair samples, we do not see any reason t reverse the trial court's credibility findings. (See People v. Devine (1981), 98 Ill. App. 3d 914, 424 N.E.2d 823, cert. denied 458 U.S. 1109 73 L. Ed. 2d 1371, 102 S. Ct. 3490.) Therefore, we conclude that the trial court did not err when it suppressed defendant's blood, hair, and saliva samples. Because we affirm the suppression on this basis, we ne not address the State's contention that the taking of the samples was sufficiently removed from the original four-day hospital detention to dissipate any taint of illegality.

Therefore, we affirm the order of the circuit court.

Order affirmed.

WHITE and FREEMAN, JJ., concur.